Sugenthiran a/l Paramasivam v Deputy Minister of Home Affairs, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(HC)-97–05 OF 2021(A)
NALLINI PATHMANATHAN, MARY LIM AND HARMINDAR SINGH FCJJ
27 MARCH 2024

Preventive detention — Detention order — Whether lawful — Appellant was ordered by Deputy Home Minister to be detained for two years at correctional facility under Dangerous Drugs (Special Preventive Measures) Act 1985 — Appellant challenged detention on ground Advisory Board ('Board') hearing his representation against detention refused his request to make available three witnesses to testify at hearing — Witnesses were then undergoing detention either in prison or other correctional facility — Board took view it was appellant's responsibility to secure attendance of his witnesses — Whether Board's decision denied appellant of fair hearing, undermined his fundamental rights and rendered his detention unlawful — Whether appellant's detention was also invalidated by fact his request for Tamil interpreter during course of police investigations against him was denied

The appellant was ordered to be detained at the third respondent's correctional facility for two years pursuant to a detention order issued by the first respondent under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316'). The appellant moved the High Court to issue a writ of habeas corpus for his immediate release, contending that his detention was unlawful for various reasons. One of them was that he was denied of a fair hearing of his representations against the detention order before the Advisory Board ('the Board') because his request to the Board to make available three witnesses to testify in his favour was denied. The appellant said it was not within his or his lawyer's power to secure the attendance of the witnesses because they were themselves under detention, either in prison or at other correctional facilities. Although the Board had power under s 12 of Act 316 to summon and examine witnesses and compel the production of documents, it took the stand that it was the appellant's responsibility to secure the attendance of his witnesses. The appellant contended that the Board's stand had breached his rights under arts 5, 8 and 151 of the Federal Constitution. The appellant also contended that Act 316 was breached when his request for a Tamil interpreter during the course of police investigations against him was denied. The appellant said although the fourth respondent ('R4'), who was the investigating officer of his case and who also spoke Tamil, had interpreted matters concerning the investigations to him, this was insufficient as R4 had an

A interest in the case and it was doubtful if his interpretations were fair and impartial. The instant appeal was against the High Court's dismissal of the habeas corpus application.

B **Held**, allowing the appeal and issuing a writ of habeas corpus for the immediate release of the appellant:

(1) The Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 made no express provision for dealing with the powers of the Advisory Board ('Board') under s 12 of Act 316. As such, it C was up to the Board, pursuant to r 10 of the said Rules, to regulate its own procedure. In other words, it was left to the Board to decide how or what the procedure was to be. The Board did not indicate how the procedure on summoning and examining witnesses under s 12 was to proceed save that because there were no rules expressly made on the matter, the D appellant had to summon his witnesses himself or deal with the relevant authorities to secure their attendance (see paras 22–25).

(2) The Board's stand that it was up to the appellant to secure the attendance of his witnesses at the representation hearing was far from satisfactory and E was a ground for granting a writ of habeas corpus as it effectively rendered the protection of the appellant's rights under s 12 of Act 316 and also under art 151 of the Federal Constitution, illusory. It even amounted to a dereliction by the Board of its powers and responsibilities under s 12. The power to summon and examine witnesses, administer oaths or F affirmations and to compel the production of documents was innate to a proper hearing of a representation as to whether a detention order should cease to have effect or not (see paras 25–26).

(3) If the Board could accede to the request of the detaining authorities, it made no sense why it could not do the same for the appellant. After all, G how difficult was it to issue a letter summoning a person to appear before the Board to be examined or to appear and produce certain documents? Neither the appellant nor his counsel was in a position to summon the three witnesses, all of whom were themselves under detention at various centres (see para 27).

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(4) On the facts, the appellant was clearly prejudiced. His repeated requests for his witnesses to be made available was refused by the Board which saw it fit to only subpoena the attendance of the investigating officer ('IO'). Since there were no rules governing the procedure for the matters stated I in s 12 of Act 316, if the Board could exercise its powers under that section to subpoena the IO, why could it not also do the same to secure the attendance of the appellant's witnesses? (see paras 28–29 & 35–36).

(5) The dual function — as inquiry officer and as Tamil interpreter to the appellant — that the fourth respondent had performed whilst

investigating the truth of the allegations against the appellant, had compromised the integrity of the investigations. In carrying out his function, the fourth respondent had to ensure that the twin pillars of natural justice were observed, ie, the rule against bias and the right to be heard. To ensure that the accused's rights were protected, an independent interpreter who was disinterested in the subject matter and was a mere conduit, 'incapable of invention to the detriment of the accused' was called for. Justice not only had to be done, but had to be seen to be done (see paras 40–43 & 45).

(6) In matters of preventive detention, procedural rules had to be strictly complied with. In the instant case, there were clear violations of the provisions of Act 316 which rendered the appellant's detention invalid and necessitated the issuance of a writ of habeas corpus for his immediate release (see paras 46–47).

[Bahasa Malaysia summary

Perayu telah diperintahkan untuk ditahan di pusat koreksional responden ketiga selama dua tahun menurut perintah tahanan yang dikeluarkan oleh responden pertama di bawah s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta 316'). Perayu memohon Mahkamah Tinggi mengeluarkan writ habeas corpus bagi pembebasan segeranya, dengan berpendapat penahanannya adalah menyalahi undang-undang atas pelbagai sebab. Salah satunya adalah beliau telah dinafikan pendengaran yang adil terhadap representasinya terhadap perintah tahanan di hadapan Lembaga Penasihat ('Lembaga tersebut') kerana permintaannya kepada Lembaga tersebut untuk menyediakan tiga saksi untuk memberi keterangan yang memihak kepadanya telah ditolak. Perayu berkata ia bukan dalam kuasa beliau atau peguamnya untuk memastikan kehadiran saksi kerana mereka sendiri berada di bawah tahanan, sama ada di penjara atau di pusat koreksional lain. Walaupun Lembaga tersebut mempunyai kuasa di bawah s 12 Akta 316 untuk memanggil dan memeriksa saksi dan memaksa dokumen dikemukakan, ia mengambil pendirian bahawa ia adalah menjadi tanggungjawab perayu untuk memastikan kehadiran saksinya. Perayu berhujah bahawa pendirian Lembaga telah melanggar haknya di bawah perkara 5, 8 dan 151 Perlembagaan Persekutuan. Perayu juga berhujah bahawa Akta 316 telah dilanggar apabila permintaannya untuk mendapatkan jurubahasa Tamil semasa siasatan polis terhadapnya telah ditolak. Perayu berkata walaupun responden keempat ('R4'), yang merupakan pegawai penyiasat kesnya dan yang juga berbahasa Tamil, telah mentafsirkan perkara berkaitan siasatan kepadanya, ini tidak mencukupi kerana R4 mempunyai kepentingan dalam kes itu dan ia diragui jika tafsirannya adil dan saksama. Rayuan semasa adalah terhadap penolakan Mahkamah Tinggi terhadap permohonan habeas corpus.

Diputuskan, membenarkan rayuan dan mengeluarkan writ habeas corpus untuk pembebasan segera perayu:

(1) Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Tatacara Lembaga Penasihat) 1987 tidak membuat peruntukan nyata untuk menangani kuasa Lembaga Penasihat ('Lembaga tersebut') di bawah s 12 Akta 316. Oleh itu, terpulang kepada Lembaga, menurut r 10 Peraturan tersebut, untuk mengawal selia prosedurnya sendiri. Dalam erti kata lain, ia diserahkan kepada Lembaga untuk memutuskan bagaimana atau apakah prosedur itu. Lembaga tidak menyatakan bagaimana prosedur memanggil dan memeriksa saksi di bawah s 12 diteruskan kecuali kerana tiada peraturan dibuat secara jelas mengenai perkara itu, perayu perlu memanggil sendiri saksinya atau berurusan dengan pihak berkuasa yang berkaitan untuk memastikan kehadiran mereka (lihat perenggan 22–25).

(2) Pendirian Lembaga bahawa terpulang kepada perayu untuk memastikan kehadiran saksinya pada pendengaran representasi adalah jauh dari memuaskan dan merupakan alasan untuk memberikan writ habeas corpus kerana ia secara berkesan memberikan perlindungan hak perayu di bawah s 12 Akta 316 dan juga di bawah perkara 151 Perlembagaan Persekutuan, sebagai suatu ilusi. Ia malah dianggap sebagai pengabaian oleh Lembaga kuasa dan tanggungjawabnya di bawah s 12. Kuasa untuk memanggil dan memeriksa saksi, mentadbir sumpah atau ikrar dan untuk memaksa pengemukaan dokumen adalah semula jadi kepada pendengaran yang sewajarnya bagi representasi sama ada sesuatu perintah tahanan harus berhenti berkuat kuasa atau tidak (lihat perenggan 25–26).

(3) Jika Lembaga boleh bersetuju dengan permintaan pihak berkuasa yang menahan, tidak masuk akal mengapa ia tidak boleh melakukan perkara yang sama untuk perayu. Lagipun, betapa sukarnya untuk mengeluarkan surat memanggil seseorang untuk hadir di hadapan Lembaga untuk diperiksa atau untuk hadir dan mengemukakan dokumen tertentu? Baik perayu mahupun peguamnya tidak mempunyai kedudukan untuk memanggil ketiga-tiga saksi itu, yang kesemuanya berada di bawah tahanan di pelbagai pusat (lihat perenggan 27).

(4) Berdasarkan fakta, perayu jelas diprejudiskan. Permintaan berkali-kali beliau supaya saksi-saksinya disediakan telah ditolak oleh Lembaga yang memandang wajar untuk hanya menyepina kehadiran pegawai penyiasat ('IO'). Memandangkan tiada peraturan yang mengawal prosedur untuk perkara-perkara yang dinyatakan dalam s 12 Akta 316, jika Lembaga boleh menjalankan kuasanya di bawah seksyen itu untuk menyepina IO, mengapa ia juga tidak boleh melakukan perkara yang sama untuk memastikan kehadiran saksi perayu? (lihat perenggan 28–29 & 35–36).

(5) Dwi fungsi — sebagai pegawai siasatan dan sebagai jurubahasa Tamil kepada perayu — yang responden keempat telah lakukan semasa menyiasat kebenaran dakwaan terhadap perayu, telah menjejaskan integriti penyiasatan. Dalam menjalankan fungsinya, responden keempat perlu memastikan tiang berkembar keadilan semulajadi dipatuhi, iaitu peraturan menentang berat sebelah dan hak untuk didengar. Untuk memastikan hak tertuduh dilindungi, jurubahasa bebas yang tidak mempunyai kepentingan dengan perkara itu dan merupakan orang tengah semata-mata, 'tidak mampu mencipta yang merugikan tertuduh' harus dipanggil. Keadilan bukan sahaja perlu dilakukan, tetapi perlu dilihat untuk dilaksanakan (lihat perenggan 40–43 & 45).

(6) Dalam hal penahanan pencegahan, peraturan prosedur perlu dipatuhi dengan ketat. Dalam kes segera, terdapat pelanggaran yang jelas terhadap peruntukan Akta 316 yang menjadikan penahanan perayu tidak sah dan memerlukan pengeluaran writ habeas corpus untuk pembebasan serta-merta (lihat perenggan 46–47).]

Cases referred to

Cheong See Leong v PP [1948–1949] supp MLJ 56, CA (refd)
Collins Nwanganga v Timbalan Menteri Dalam Negeri & 2 lagi (Criminal Appeal No 05–251–10 of 2017 (B)) (unreported), FC (refd)
Fong Choon San v Timbalan Menteri Dalam Negeri & Ors [2017] 7 MLJ 440, HC (refd)
Kanagaeswaran a/l Siwarpikasam v Timbalan Menteri Dalam Negeri & 2 lagi (Criminal Appeal No 05–178–08 of 2017 (B)) (unreported), FC (refd)
Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2009] 1 MLJ 445; [2009] 1 CLJ 686; [2008] 2 MLRA 748, FC (not folld)
Mohammad Azanul Haqimi bin Tuan Ahmad Azhari v Timbalan Menteri Dalam Negeri & Ors [2019] 6 MLJ 220; [2019] 8 CLJ 465, FC (refd)
Tamilarasan a/l Subramaniam v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 6 MLJ 147; [2021] 10 CLJ 163; [2021] 6 MLRA 294, FC (not folld)
Timbalan Menteri Dalam Negeri, Malaysia & Anor v Awang Sari bin Lasikan (Criminal Appeal No 05(HC)-69–04 of 2021(B)) (unreported), FC (folld)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 rr 5, 7, 10
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 2, 3, 3(3), 4, 5, 5(3), 6, 6(1), 12, 14, Part II
Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1959
Federal Constitution arts 5, 8, 123, 151, 151(2)

Appeal from: *Sugenthiran a/l Paramasivam v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] MLJU 1630 (High Court, Taiping)

Selvam Shanmugam (with Surenthiran Raj and Yuganiya a/p Rajalingam) (Selvam Shanmuham & Partners) for the appellant.

Muhammad bin Sinti (with Farah Ezlin bt Yusop Khan) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Mary Lim FCJ (delivering judgment of the court):

INTRODUCTION

[1] On 15 September 2020, the appellant was detained for a period of two years pursuant to an order made by the first respondent under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316). The appellant was/is detained at Pusat Pemulihan Akhlak, Machang, Kelantan. The appellant applied for a writ of habeas corpus on the basis that his detention is illegal as the detention order made by the first respondent is null and void.

[2] Upon hearing learned counsel for the appellant and learned senior federal counsel for the respondents, we unanimously allowed the appeal on two grounds and proceeded to issue a writ of habeas corpus for the immediate release of the appellant. We hereby elaborate on the two grounds.

MATERIAL FACTS

[3] The relevant facts leading to the detention of the appellant are well set out in the grounds of decision of the learned judicial commissioner. We summarise those facts as follows.

[4] The appellant was arrested on 23 July 2020. At the time of arrest, he was informed that he was said to be involved in drug trafficking activities in Taiping, Perak. The detention order that was subsequently issued on 15 September 2020 states that the appellant 'pernah ada kaitan dengan aktiviti yang berhubungan dengan atau yang melibatkan pengedaran dadah berbahaya dan adalah perlu bagi ketenteraman awam supaya penama ditahan'. This was amplified by the learned judicial commissioner — that 'by allowing him to be free, at ease and at large, he would be menace to the society at large, endangering public order as drug trafficking activity would swell without bounds'.

[5] The appellant moved the High Court at Taiping for a writ of habeas corpus on several grounds, amongst which are:

(a) that he was deprived of his rights when he was not able to call three material witnesses, namely Navendran a/l Suppiah, detained at Taiping Prison, Balan a/l Paramasivam, detained at the Simpang Rengam Pusat Pemulihan Akhlak, Johor, and Devan a/l Paramasivam, also a detainee, to support his representation and/or defence and/or to prove his innocence to the Advisory Board pursuant to the requirements of s 12 of Act 316; arts 5, 8 and 151 of the Federal Constitution even though his solicitors had applied to the Advisory Board to issue subpoenas against these witnesses;

(b) that he was deprived a fair trial at the hearing of his representations on 17 November 2020 given that the evidence of these three material witnesses could not be heard;

(c) that consequently, there was no effective and proper hearing of his representation contrary to the provisions of arts 5, 8 and 151 of the Federal Constitution; and

(d) that there was non-compliance of ss 4 and 5 of Act 316 in the matter of translation, as requested by the appellant; and that any translation, if done, was in fact by the same officer investigating the allegations against the appellant.

[6] By a separate interlocutory application, the appellant had also sought sight of the lock-up diary, contending that it would prove that the order of detention was not served on him at the place as stated in the order. He had also asked for production of the notes of proceedings at the inquiry. Both requests were refused and the application was dismissed. The absence of these documents was cited as additional complaints for the issue of a writ of habeas corpus.

[7] As mentioned at the outset, we had allowed this appeal on two grounds and these were, the refusal to issue the subpoenas summoning the attendance of material witnesses for the appellant, and the matter of translation by the same person conducting the investigations. We did not find merit in the remaining grounds of complaint.

Summoning of witnesses

[8] The appellant's request for summoning the persons he regarded as material witnesses, that is, the persons whom he reasonably believed will exculpate him from the allegations made against him, was made to the Advisory Board. He had named Navendran a/l Suppiah, detained at Taiping Prison, Balan a/l Paramasivam, detained at the Simpang Rengam Pusat Pemulihan Akhlak, Johor, and Devan a/l Paramasivam, also a detainee, to support his representation and/or defence and/or to prove his innocence to the

A Advisory Board. The appellant had not only identified the persons he needed for the inquiry, he had also indicated where these individuals may be found.

[9] In response to his request, which was not suggested to be in the least unreasonable, the Advisory Board refused to issue subpoenas and left it to the B appellant to compel or obtain the attendance of these persons; that it was for the appellant or his lawyer to deal with the relevant parties including the prison officials to ensure the attendance of these persons who were themselves, detainees.

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[10] The appellant contended that this refusal to issue subpoenas under s 12 amounted to an outright violation of his right to a fair hearing under arts 5, 8 and 151 of the Federal Constitution. His right to a fair and effective representation was prejudiced as a result of this refusal as his representation to D the Advisory Board was without witnesses who were paramount to supporting his defence.

[11] Apparently, the hearing of the appellant's representation took place on 17 November 2020 at Pusat Pemulihan Akhlak, Machang, Kelantan. The E appellant invited the High Court to draw an adverse inference to this refusal, especially since the burden was on the respondent to justify the detention (see: *Mohammad Azanul Haqimi bin Tuan Ahmad Azhari v Timbalan Menteri Dalam Negeri & Ors* [2019] 6 MLJ 220; [2019] 8 CLJ 465).

F **[12]** The High Court refused, opining that s 12 was only triggered when the witnesses are able and willing to come and testify before the Advisory Board. Relying on *Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2009] 1 MLJ 445; [2009] 1 CLJ 686, there must be materiality in the evidence to be offered by these potential witnesses; and the G appellant ought to have impressed upon the Advisory Board on this issue of materiality, that it, the Board would not be able to reach a just and fair decision unless the testimonies of these persons were obtained. Since the appellant or his representative failed to do that, he could not now blame the Board.

H **[13]** We appreciate that this issue under s 12 of Act 316 has been raised in several previous challenges; the most recent being *Tamilarasan a/l Subramaniam v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 6 MLJ 147; [2021] 10 CLJ 163; [2021] 6 MLRA 294 where this court held *amongst others* that it was not a mandatory procedural requirement for the I Advisory Board to accede to a request by a detainee to summon witnesses whom he wished to call at the representation hearing. The decision in *Lim Wen Jeng v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2009] 1 MLJ 445; [2009] 1 CLJ 686; [2008] 2 MLRA 748 discussing a similar provision in the Emergency (Public Order and Prevention of Crime)

Ordinance 5 of 1959 was followed in *Tamilarasan*.

[14] In *Lim Wen Jeng,* it was held that the Advisory Board could not be compelled to exercise its discretionary power to issue subpoenas applied for by the detainee. If the detainee wished the presence of such witness, it was for the detainee to make the witness available at the hearing; there was no obligation on the Board to summon such witnesses.

[15] We appreciate that two other decisions, namely *Kanagaeswaran a/l Siwarpikasam v Timbalan Menteri Dalam Negeri & 2 lagi* (Criminal Appeal No 05–178–08 of 2017 (B)) and *Collins Nwanganga v Timbalan Menteri Dalam Negeri & 2 lagi* (Criminal Appeal No 05-251–10 of 2017 (B)) were cited in sharp contrast to *Lim Wen Jeng*. In these two decisions decided, the Federal Court had allowed both appeals on the ground that the Advisory Board's refusal to exercise its power to summon witnesses on application by the appellant was a wrong exercise of discretion. The Federal Court however, declined to follow these two other decisions and chose instead to follow *Lim Wen Jeng*, for the particular reason that there were no written grounds available to discern the basis for those two decisions.

[16] We, on our part, decline to follow *Tamilarasan*. The decision has in any event, been overruled in respect of the matter of computation of time under s 3(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985 in *Timbalan Menteri Dalam Negeri, Malaysia & Anor v Awang Sari bin Lasikan* (Criminal Appeal No 05(HC)-69–04 of 2021(B)) on 7 December 2021 (*Awang Sari*).

[17] In the brief grounds for its decision, the Federal Court explained that *Tamilarasan* and another decision, *Lock Wee Kok* were 'not good law' on the issue of delay because:

> (a) a reading of the Act clearly envisages that the Minister must make regulations detailing time limits. Where he has failed to do so, then the Interpretation Acts come into play meaning as expeditiously as possible — that is an objective test to be determined by the court when considering all of the circumstances. It will vary from case to case. This is the ratio of *Chua Kian Voon*. *Tamilarasan* is wrong in law because it fails to consider that the subsistence of a time limit is envisaged by the statute itself, but not regulated as yet by the Minister. That means a time limit was envisaged to be stipulated within the 60 day period. That in turn means that a specific time period was clearly envisaged to comprise the time within which the relevant report has to be made. And that time limit falls well within the 60 day period. So, it is incorrect to suggest that because the Minister has not stipulated a time, it follows that time is at large. Neither does it follow that any time within the entire 60 day period is acceptable. Rather, the failure by the Minister to prescribe regulations on time, warrants even

greater scrutiny by the courts to ensure that matters are not left at large for the entirety of the 60 day period which is what the case appears to imply;

(b) these cases (*Tamilarasan* and *Lock Wee Kok*) fail to give any consideration to the purpose and object of the statute, which is required under the Interpretation Acts and the general law relating to statutory interpretation. The object of the statute is to preventively detain a person but only if it is the case that there is sufficient reason to do so under the preventive detention legislation promulgated under art 149. And that in turn is because it adversely affects, or negates the liberty of a person. As such it is not permissible to construe the statute without taking into effect this fundamental issue. It is because the liberty of a person is put in peril that time is not at large — the officers who are in charge of making the respective reports are required to prioritise these cases because the liberty of a person whose rights as a citizen are entitled to full recognition under the FC must be respected. In other words, if excessive time is taken over the production of the requisite reports it will affect the duration of the detention time. Meaning that if the reports are issued early, the Minister may decide NOT to detain and the person will be released immediately. *Chua Kian Voon* recognises this. *Tamilarasan* and *Lock Wee Kok* do not. The result in applying *Tamilarasan* is that various officers during the process are at liberty to take as long as they want, thereby depriving the liberty of a person who may not eventually be detained, and placing undue burden on the latter parts of the process which will have to be effected hastily in order to meet the 60 day deadline. In other words, is it in order for the first report to be issued 45 days after the detention and everything else hurried after that, such that fundamental matters will have to be rushed through? That cannot rationally be the function and purpose of the Act.

[5] If the construction that mere procedural review is the only basis on which to examine these ministerial orders, then extremely strict compliance is required.

[18] In respect of the matter of summoning witnesses, we also decline to follow the decisions reached in *Tamilarasan* and *Lim Wen Jeng*; principally for the same reasons set out in *Awang Sari*, that is, the use of a purposive interpretation of the relevant provisions and there being due regard for the protection of fundamental rights under the Federal Constitution. It is therefore timely and appropriate that we relook at the relevant provisions, closely.

[19] The whole regime on preventive detention in Act 316 is to be found in Part II — 'Powers of Preventive Detention'. The provisions deal with the whole range of matters starting from the detention and restriction of a person without warrant, investigations by the police officer, inquiries by the inquiry officer including the power to summon and examine witnesses as well as administering oaths or affirmations for that purpose, preparation of reports by the police officer and the inquiry officer, detention orders by the Minister, representations against such orders to the Advisory Board, powers of review by

the Advisory Board, preparation of reports by the Advisory Board; just to name some principal provisions.

[20] Then, there is s 12. Similar to the powers given to the inquiry officer in s 5(3), s 12 expressly empowers the Advisory Board to summon and examine witnesses, administer oaths or affirmations and compel production of documents:

> 12 Power to summon witnesses
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> Every Advisory Board shall, for the purposes of this Act, but subject to section 14, have all the powers of a court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.

[21] Section 14 deals with disclosure of information, that there is protection against disclosure where it is against the national interest to produce or disclose. This provision is not engaged in the circumstances of this appeal. But, s 12 is.

[22] To facilitate the carrying out of its functions under Act 316, the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 have been enacted. These Rules attend to matters such as the procedure for making representations, the form representations are to take, hearing of representations, and the procedure for review of detention and restriction orders. The detainee has a right to be physically present with or without counsel at these representations aside from a right to orally address the Board either to substantiate or amplify the grounds or reasons why the detention should cease (r 5). The hearings are all conducted in camera (r 7).

[23] Rule 10 is of particular relevance and it reads as follows:

> 10(1) Subject to the provisions of the Act and these Rules, where any matter is not expressly provided for by these Rules, the Board may regulate its own procedure.
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> (2) In particular, but without prejudice to the generality of paragraph (1), the Board may, having regard to the circumstances of security, in its discretion determine:
>
> (a) whether the evidence of any should be heard in the presence of a detained person or his representative or both;
>
> (b) whether any police officer should be required to appear before the Board in the presence of a detained person or his representative, or both; and
>
> (c) whether any document or other information should be made available or disclosed to a detained person or his representative, or both.

[24] No regulations or rules have been made dealing expressly with the powers in s 12 in which case, it is left to the Board 'to regulate its own

procedure'. In other words, it is left to the Board to decide how or what the procedure is to be.

[25] The Board has not indicated how the procedure on summoning and examining witnesses under s 12 is to proceed save that because there are no rules expressly made on the matter, it responded in the way that it did, that is, the appellant was to summon the witnesses himself or deal with the relevant authorities to secure attendance of potential witnesses.

[26] In our view, such a response is far from satisfactory and is ground for the grant of the order of habeas corpus as it effectively renders the protection in s 12 and also art 151 of the Federal Constitution, illusory. It may even equate to a dereliction of the powers cum responsibilities provided in s 12. The power to summon and examine witnesses, the administration of oaths or affirmations, and to compel the production of documents is innate to a proper hearing of representation as to why a detention order should cease or not cease.

[27] If the Advisory Board can accede to the request of the detaining authorities, it makes no sense why it cannot do the same for the appellant. After all, how difficult is it to issue a letter summoning a person to appear before the Board, be examined; or to appear and produce certain documents. It is the entity summoning the attendance for examination that matters, not the form. Neither the appellant nor his counsel is in the position to summon any person, let alone persons in the name of Navendran a/l Suppiah, detained at Taiping Prison, Balan a/l Paramasivam, detained at the Simpang Rengam Pusat Pemulihan Akhlak, Johor, and Devan a/l Paramasivam, also a detainee, to attend the hearing. That will also run contrary to the clear terms in s 12 and any summoning by the appellant or his counsel may, arguably, be of no effect or force.

[28] On the facts, there was clearly a misapprehension to the prejudice of the appellant. The appellant had repeatedly sought the attendance of these two persons. Each time, it was refused by the Advisory Board who saw it fit to only subpoena the investigating officer. The Board left it to the appellant and his counsel to apply directly to the detaining authorities or the prison authorities to secure the attendance of these persons. See letters dated 23 October 2020 and 27 October 2020 from the appellant to the Advisory Board. If those are not efforts towards impressing on the Board the importance of these witnesses to the appellant, it is difficult to see what else needs to be done.

[29] On the law, the High Court also had fallen into error. Any right to be make representations within the intent and scope of art 151 is only meaningful if the appellant is able to present his defence properly. Towards this end, the law has already anticipated that he may need to call witnesses; hence the existence

of s 12. This provision clearly empowers the Advisory Board to summon and examine witnesses, just like a court of law. This power cannot and is not dependent on the Board enacting regulations or any rules of procedure before the Board may resort to those powers, that until rules are made, the Board regulates its procedure by telling detainees such as the appellant to summon the witnesses themselves. Should that be the proper reading, then the Board's summoning of the investigating officer itself begs reasoning, given that it arises from the same power.

[30] In our view, the Board's response to the appellant is unacceptable. Now, who is the Advisory Board?

[31] Act 316 defines in s 2 that the 'Advisory Board' means an Advisory Board constituted under cl (2) of art 151 of the Constitution for the purposes of that article. Article 151 reads as follows:

> 151 Restrictions on preventive detention
>
> (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer periods as the Yang di-Pertuan Agong may allow.
>
> (2) An advisory board constituted for the purpose of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members who shall be appointed by the Yang di-Pertuan Agong.
>
> (3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[32] The Federal Constitution clearly confers a right to a detainee to hear the reasons for his detention, the allegations of fact upon which a detention order is made; and of paramount importance, affords him an opportunity to make representations against the order of detention. These are constitutional safeguards which must be observed by all involved in the process.

[33] It is also worthwhile noting that representations are made not to a faceless entity but to an advisory board whose chairman has to be someone who is legally qualified to be a judge, be it of the High Court, Court of Appeal or Federal Court. Under art 123 of the Federal Constitution, a person is qualified to be a judge of the Federal Court, Court of Appeal or High Court if the person is a Malaysian citizen with ten years' experience, be it as an advocate or a member of the judicial and legal service. In short, the chairman is someone with adequate legal or judicial experience and seniority, and would either be familiar with or at least be in the position to obtain necessary information about court proceedings, and the business of fact finding and application of the law to the facts. This aspect seems to have escaped the attention of the respondents, that the responsibility of chairing an advisory board is entrusted by the Federal Constitution on what it believes would be the most appropriate person to guide and helm the Board.

[34] Consequently, when s 12 confers upon the Board the same powers the court has for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents, there must be rules or regulations made expeditiously detailing the related procedure. In the absence of express powers in the rules and regulations on such matters, the Board's power to 'regulate its own procedure' simply means it is not restricted to a prescribed form or procedure.

[35] For the present purpose, it would be reasonable to expect the Advisory Board to issue a letter to the relevant authorities or persons, summoning the attendance of identified persons for the purpose of the hearing. As mentioned earlier, neither the appellant nor his counsel would be in the position to invoke the powers under s 12 unto themselves. That power is reposed in the Advisory Board and their dereliction clearly prejudiced the rights of the appellant to a fair hearing and the opportunity to make representations as provided in Act 316 and the Federal Constitution.

[36] In matters of preventive detention where the fundamental liberties of a person are compromised, there must be in place, at the very least, the procedure upon which the detainees may exercise his rights, in this case, the right to have witnesses summoned. Since such procedure is yet to be expressly enacted, the Advisory Board should just get on with processing the request instead of pushing it back to the appellant. The failure of the Board to accede to the appellant's request has, in our view, prejudiced the appellant's rights under the Federal Constitution.

Tamil interpreter

[37] The complaint here is this — the appellant had sought to speak in Tamil, his mother tongue during the course of the investigation. The investigating officer decided to 'doubled up the role as a Tamil interpreter' since he was also Tamil speaking. The recording of the statement under Act 316 was thus conducted with the investigating officer performing dual tasks of asking questions and translating those same questions to and then the answers from the appellant. 'Due to inadvertence, the IO did not state in the requisite column in the statement made by the detenu, that he was the interpreter too. As iterated by the IO in his affidavits, it was purely inadvertence on his part'. The appellant claimed that he was aggrieved, his detention was unlawful and void ab initio as he was prejudiced by the failure of the IO to comply with the mandatory provisions of Act 316.

[38] Once again, the High Court disagreed. According to the High Court:

> It is bizarre at this age and time for a citizen of this country, including the applicant not to be able to understand Bahasa Malaysia ... it would only be befitting for the investigating officer ('IO') of his case to explain and interpret to him in the Tamil language and not Bahasa Malaysia. It is asserted that he had requested for a Tamil interpreter but not provided one. What has been forgotten is the stark fact that at the phase of investigation, the IO ... had employed a dual role, both as an investigator and Tamil interpreter to assist the applicant. He had interpreted and explained the questioning and examination as required under s 4 of Act 316 which took place in Bahasa Malaysia into the Tamil language. This is done to ensure that the applicant at all times, understands and appreciates the questioning, examination and investigation of the case against him.
>
> [14] ...
>
> [15] In fact, there is no procedural requirement for the inquiry officer to have the inquiry done and interpreted to the applicant in the Tamil language. But if the detenu request for one, then he has to oblige. In the present case, there had been no request made.
>
> [16] ...
>
> [17] ... of course, the applicant is entitled to speak in the language he is conversant with. But he had no qualms of speaking in the national language, albeit him requesting for a Tamil interpreter. The same could not be undertaken by the Inquiry Officer, as he is conversant in Bahasa Malaysia ...

[39] Essentially, the learned judge disbelieved the appellant had requested for a Tamil interpreter at the material time. However, it stands to reason that one must have been requested, that there was an issue with language. Otherwise, the IO would not even have done any at all to start with. Surely, he did not do so for altruistic reasons, but for the request of the appellant. Hence,

A the fourth respondent's admission to his failure to sign off in the particular column of the report. The learned judge was clearly in error in his evaluation of these facts.

B **[40]** The whole purpose of the investigations under s 6 of Act 316 is towards a preparation of a report for the Minister to decide whether a detention or restriction order needs to be issued against a detainee. Here, the investigating officer, as the inquiry officer would be investigating the allegations of fact and basis reached by the police officer as set out in his report under s 3. His sole function is to investigate whether there are 'reasonable grounds for believing C that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs', as provided in s 6. This is an extremely important function with an equally onerous responsibility which must be undertaken with the utmost care and observance of the twin rules of natural justice; that is, the rule against bias and the right to be heard. This right D is implicitly recognised and safeguarded in art 151, as set out in the earlier part of this judgment.

[41] With this, it is quite clear that the fourth respondent, no matter what E his good intentions may be, the dual function that he performed while investigating the truth of the allegations of fact and reasons have indeed compromised the integrity of the investigations. These investigations which in turn led to the preparation of the report upon which the Minister then determined that the appellant should be detained according to the terms as set F out in the detention order, is the substratum of the whole detention order.

[42] There are reasons why there is a need for the identification of a translator where one is used; it is obviously to ensure that the rights and protection afforded under the Federal Constitution are not mere platitudes but G respected and honoured on the facts. The detainee who does not have the opportunity to test out and challenge the allegations against him (generally done in a court of law) and where he has been deprived of his liberty under art 5, is entitled to expect strict adherence of the provisions of the law.

H **[43]** An independent interpreter is necessarily called for; such person being disinterested in the subject matter and is a mere conduit, 'incapable of invention to the detriment of the accused', to quote the words of Spenser Wilkinson J in *Cheong See Leong v Public Prosecutor* [1948–1949] supp MLJ 56, applied well in *Fong Choon San v Timbalan Menteri Dalam Negeri & Ors* I [2017] 7 MLJ 440.

[44] Frequently, in a cosmopolitan and multiracial nation such as ours, judges presiding over any case may be familiar with a particular language or dialect used by a witness in testimony. While the judge may point to a possible

inaccuracy in the translation, the judge must never take over the task of translation itself. That will surely compromise the integrity of the proceedings as it is clearly in breach of the rules of natural justice.

[45] Similarly, in the case of the fourth respondent who was performing the task of investigation inquiring into the truth of the allegations against the appellant with the object of preparing a report and making certain recommendations relating to the liberty of the detenu. Justice must not only be done but also be seen to be done.

[46] As ruled in *Awang Sari*, there must be strict compliance with the procedural rules when it comes to matters of preventive detention. There have been clear violations of the provisions of Act 316.

CONCLUSION

[47] For these reasons, the detention is clearly invalid. A writ of habeas corpus is thus issued and the appellant is released forthwith.

Appeal allowed and a writ of habeas corpus issued for the immediate release of the appellant.

Reported by Ashok Kumar